or reflux of the tide, or lightning, he is not held liable: Abbott on Shipping (Perkins' ed.) 470, 471, 472, 473, 474, 475, and cases cited.

The bill will be dismissed.

LEGAL NOTES.

PARDON—DELIVERY—REVOCATION BY NEW EXECUTIVE. *Matter of Moses De Puy*, in the District Court of the United States, for the Southern District of New York (June 1869), was a petition for discharge on *habeas corpus*. It will be recollected that the petitioner had been convicted at the January Term 1869, of this court, of having rescued distilled spirits from the custody of a revenue officer of the United States, and on March 3d 1869, President Johnson had signed a pardon, which was revoked by President Grant among the first acts of his administration. The facts, which elicited much comment at the time, appear by the judicial investigation to have been as follows: One James M. Nelson presented a petition to the President on behalf of De Puy, praying a pardon. On March 3d 1869, the President endorsed on this petition a direction that a pardon be issued, and handed this to Nelson with a direction to take it to the Attorney-General. Nelson took the petition to the Attorney-General and left it with him, receiving a letter to the Secretary of State, requesting the Secretary to issue a warrant for the pardon of De Puy, with certain recitals. Nelson took this letter to the Secretary of State, obtained a pardon which he took to the President, procured his signature and brought it back to the Secretary of State, who then signed it and directed his clerk to have the seal put to it, and to transmit it, with a letter in relation to it, to the Marshal of the Southern District of New York. Nelson asked if he could not take the pardon, but was told that it must go by mail to the marshal in the usual course of business. The pardon was dated March 3d 1869, and recited the conviction of De Puy, and the reasons in consideration of which the President pardoned him on condition of the payment of the fine which was part of his sentence. This pardon was sent by mail to the marshal, with a letter in the following terms: "Sir, I transmit herewith the President's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge. Yr. obt. servant, F. W. Seward." The pardon and letter were received by the marshal March 5th 1869. On the next day, while the pardon was still in the marshal's hands, he received a message by telegraph from the Secretary of State directing him to regard it as cancelled and return it to the State Department, which was accordingly done. The invariable custom of the State Department in issuing pardons, is to send them by mail to the United States marshal of the district in which the prisoner is confined, and the marshal usually transmits them to the keeper of the prison. The turning-point of the case was as to the delivery of the pardon, the petitioners insisting that the act of mailing it to the marshal was a full delivery in the only

manner recognised by the Executive Department, and passed the entire control of the pardon out of the hands of the President, and entitled the petitioner to his liberty on compliance with the condition—that is, payment of the fine, which had been done. The district attorney, on the other hand, contended that the marshal was a part of the executive, and until the pardon had passed out of his hands and into those of the prisoner or his agent, it was not delivered, and was therefore revocable.

BLATCHFORD, J., in giving judgment, made an elaborate review of the subject of delivery in relation to pardons, citing *Marbury* v. *Madison*, 1 Cranch 137; *U. S.* v. *Wilson*, 7 Peters 150, and *Commonwealth* v. *Halloway*, 44 Penn. 210, 2 Am. Law Reg. N. S. 474, and held, that as the marshal in this case was the messenger of the President, and not the agent of the prisoner, and there had been not only no delivery to the prisoner, but none to the warden of the prison who had sole control and custody of the prisoner, there had been no delivery of the pardon, and it was legally revoked by the action of the President.

Our readers will find all the principal American cases on the subject of pardons, collected in the note to the very curious and interesting case of *Commonwealth* v. *Halloway*, 2 Am. Law Reg. N. S. 474.

CONSTITUTIONAL LAW—POWER OF THE PRESIDENT TO APPOINT TO A VACANT OFFICE, WHEN THE VACANCY DID NOT OCCUR IN THE RECESS OF THE SENATE. *Schenk* v. *Peay and Bliss*, in the United States Circuit Court, District of Arkansas (April 1869), was a bill in equity to quiet title to certain real estate as against one defendant, and for partition as to the other. Peay, one of defendants, was the original owner of the real estate; Bliss, the other defendant, was the purchaser under a tax sale under the Direct Tax Act of Congress of 1861, and the amendment of June 7th 1862, and Schenk, plaintiff, was a purchaser from Bliss. Peay filed an answer and a cross-bill against plaintiff and his co-defendant, which the court (MILLER, Circuit Judge, and CALDWELL, D. J.) after argument allowed, although Peay and Bliss were both citizens of Arkansas, the parties being already before the court, and the court being satisfied that the matters in the cross-bill were strictly defensive to the original bill, and necessary to bring before the court in a proper shape the defence relied on, and also that the interests of Bliss, though he was nominally a co-defendant, were substantially with the plaintiff and against Peay. The court also appointed a receiver on the petition of plaintiff in the cross-bill, although defendants (in the cross-bill) were in possession of the land under legal title.

The main question in the case, however, was the validity of the sale by the tax commissioners, under which plaintiff claimed title. The Act of June 7th 1862 (12 Stat. 422), authorized the President to appoint three persons who should constitute a board of tax commissioners. The court held that all three must act to make the exercise of their authority valid, and that the Act of March 3d 1865, § 3 (13 Stat. 502), declaring that a majority of the board should have power to act, was not retrospective, and did not cure a title under sale by two commissioners prior to the passage of the act.

Subsequently, on final hearing on amended pleadings, the court (CALDWELL, D. J.) held:—

1. The Act of July 20th 1868 (15 Stat. 123), is retrospective in its

terms, but does not give validity to the acts of two tax commissioners unless there were three in office at the time.

2. One who was appointed to office without authority of law, and who never performed any duty, and never had the reputation of being such officer, is not an officer, *de jure* or *de facto*.

3. Where an office was created and took effect during a session of the Senate, and that and a subsequent session of Congress passed without the office being filled, the President could not make a valid appointment to the office during the recess of the Senate.

On the last point the court cited with strong commendation, and relied on the opinion of CADWALADER, J., in *The case of the District Attorney*, 7 Am. Law Reg. N. S. 786, and also *People ex rel.* v. *Forquier*, 1 Breese 70.

The subject of sales under the Direct Tax Acts was elaborately considered in the opinion of CALDWELL, J., and the sale in this case declared void, both for defect of jurisdiction, and for fraud in the acts of the commissioners.

ESTOPPEL TO ALLEGE UNCONSTITUTIONALITY OF A LAW. *Ferguson et al.* v. *Landrum et al.*, in the Court of Appeals of Kentucky (June 1869), decides a novel point in relation to the law of estoppel. In 1864 the President of the United States ordered a draft for military service. The people of Gallatin county, to avoid the draft, held a public meeting and resolved to raise a bounty fund to induce the requisite number of men to volunteer; and appointed a committee to borrow the money, and obtain an Act of the Legislature authorizing the levy of a tax to repay it. This plan was carried out, the act passed by the legislature authorizing a bounty tax, the money borrowed, and the volunteers obtained. In 1865 a number of citizens of the county filed a bill to restrain the collection of the tax on the ground that the act authorizing it was unconstitutional, and the Court of Appeals so held (ROBERTSON, J., dissenting) on the ground that the United States having called on the people for military duty as a government directly, and not through the medium of the states, the state had no constitutional power to levy an involuntary tax on the people of the counties to give the Federal soldier an additional compensation, nor had it power to levy such tax on those not liable to military duty, to aid those who were, in avoiding its performance by the additional compensation to volunteers. (On this point see *Opinion of S. C. of Maine*, 2 A. L. R. N. S. 621; *Speer* v. *School Directors*, 4 Id. 661; *Booth* v. *Woodbury*, 5 Id. 202; *Taylor* v. *Thompson*, 6 Id. 174.) But the most interesting point is the farther opinion of the court, based on grounds of general equity, that all persons liable to military duty, either in their own persons or those of their minor sons or slaves, had received a valuable consideration for the money loaned, and would not be allowed now to refuse payment, and all who participated in the procurement of the law, or afterwards voluntarily ratified the action of the committee under it, were *estopped* from now setting up its unconstitutionality as a defence to the collection of the tax under it.

FEDERAL AND STATE COURTS—THE CONFLICT OF JURISDICTION IN IOWA. The County of Lee, Iowa, in 1857, under a statute of that state, issued its bonds in aid of certain railroads. At the time of issue,

the right to make such bonds was sustained by the Supreme Court of Iowa. (*Dubuque County* v. *Dubuque and Pacific Railroad Co.*, 4 Greene 1; *State* v. *Johnson County*, 10 Iowa 157, and other cases.) Subsequently, in June 1862, in the case of *State ex rel.* v. *Wapello County*, 13 Iowa 390, the Supreme Court of Iowa overruled its previous decisions, and held that the constitution prohibited the issue of such bonds, and that they were absolutely void. A holder of a similar bond then brought an action in the Circuit Court of the United States for the District of Iowa, and it was there decided, on the authority of *State* v. *Wapello County*, that he could not recover; but, on a writ of error, the Supreme Court of the United States, at the December Term, 1863, in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, said that although it was the practice to follow the latest decisions of the state courts in construing state laws and constitutions, yet it would not necessarily follow a decision overruling previously settled law, and which might prove to be a mere oscillation in the course of a judicial construction.

The court therefore held that the bonds were good, and refused to follow the decision in *State* v. *Wapello County*, so far as regarded bonds issued before that decision was made. This view has since been affirmed in *Thompson* v. *Lee County*, 3 Wall. 327, *Rogers* v. *Burlington*, 3 Wall. 664; while, on the other hand, the Supreme Court of Iowa has adhered to its decision in *State* v. *Wapello County* in numerous subsequent cases: *Meyers* v. *Johnson County*, 14 Iowa 47; *McMillan* v. *Boyle*, Id. 107; *Rock* v. *Wallace*, Id. 593; *Smith* v. *Henry County*, 15 Iowa 385, and *Ten Eyck* v. *Mayor of Keokuk*, Id. 485.

From this difference of views between the courts of the United States and the state of Iowa, a conflict of jurisdiction has recently arisen, which we should regard as very serious were it not for the good judgment and moderation of the courts by which it must finally be determined.

The county of Lee was one of those which issued bonds in aid of railroads, in the year 1857. Interest on these bonds was paid for several years, and in July 1860, a bill was filed by certain citizens and taxpayers of that county, for an injunction to the supervisors of the county to restrain the assessment and collection of any tax for payment of interest or principal. The bondholders were not made parties to this bill; the county officers alone were made defendants. The only relief sought was to restrain the levy and collection of taxes by the county officers for the payment of railroad bonds or coupons.

The case went on appeal to the Supreme Court, which, on December 1st 1862, gave judgment for complainants, and on June 5th 1863, entered a decree *nunc pro tunc*, perpetually enjoining the defendants from levying or collecting any tax for payment of said bonds: *McMillan* v. *Boyle*, 14 Iowa 107.

This decision of the Iowa Supreme Court was made *before* the decision of the United States Supreme Court in *Gelpcke* v. *City of Dubuque*, *supra*, and also before the commencement in the United States courts of the action next to be mentioned.

In April 1863, J. Edgar Thompson, a citizen of Pennsylvania, and a holder of bonds of Lee county, brought an action upon his coupons, against the supervisors, in the United States Circuit Court for Iowa, which was subsequently transferred to the Circuit of Northern Illinois,

which, at the October Term, 1864, rendered judgment for plaintiff. The judgment being unpaid, and there being no property on which an execution could operate, the United States Circuit Court for N. Illinois, in July 1868, issued an alternative, and in October, a peremptory *mandamus* to the supervisors of Lee county, commanding them to levy a tax to pay the judgment. No return was made by the supervisors to either writ, but on the day the peremptory writ was served on them, they passed a resolution setting forth the above mentioned injunction, proceedings and decree of the Supreme Court of Iowa, and that they were *unable* to comply with the mandate of the writ without committing a contempt of the Iowa court, and violating their oath of office to obey the laws of the state of Iowa. At the January Term, 1869, the Circuit Court, on application and proof of the foregoing facts, issued an attachment against the supervisors for *contempt* in disobeying the mandate of the *mandamus*. The opinion of DRUMMOND, J., will be found in full in Chicago *Legal News*, for January 16th, 1869.

Under this attachment, the United States marshal for Iowa, on March 3d, took the supervisors in custody, but before getting out of the state, was served with a *habeas corpus* issued by Judge BECK (of the Supreme Court of Iowa) sitting at chambers, who, on hearing, discharged the supervisors from custody. We have been furnished with a pamphlet copy of the opinion of Judge BECK, and regret that its length prevents our giving it in full. The first point made was on the jurisdiction of a state judge to inquire on *habeas corpus* into the cause of detention after a return setting forth that the prisoners were held under process issued by a court of the United States. On this vexed point Judge BECK'S conclusion is: "That where one is held in imprisonment under claim of Federal authority, and it appears that such restraint is illegal, in that the officer holding him has no power to do so under the law, his authority therefor being based upon a judgment void for want of jurisdiction, the state court, under the writ of *habeas corpus*, has the power to release from the imprisonment." The judge admits that the authority of the Supreme Court of the United States, in *Ableman* v. *Booth*, 21 How. 516, is against his conclusion; but expresses a confident opinion that that case will be overruled when the point shall again arise in the same court. Judge BECK does not claim any authority to examine into the legality of the attachment for contempt on any other ground than the want of jurisdiction of the court over the persons of the supervisors, or the subject-matter in the *mandamus* proceedings.

Being of opinion that he had authority to inquire into the jurisdiction of the court issuing the attachment, Judge BECK then proceeds to show that it had no jurisdiction of the subject matter, because it was a subject of concurrent jurisdiction in the United States and the state court, and the latter having acquired jurisdiction first by injunction issued before the commencement of the action by Thompson, its jurisdiction became exclusive by the well-settled doctrines of comity. On this point the judge distinguished the case from *Riggs* v *Johnson County*, 6 Wall. 166, and *Weber* v. *Lee County*, Id. 210, in which the Supreme Court of the United States decided (CHASE, C. J., and GRIER and MILLER, JJ., dissenting) that the Federal courts could issue *mandamus* to a state officer to do an act, from which he had

been enjoined by a state court, the Federal court in those cases having first acquired jurisdiction of the parties and subject-matter.

The marshal has appealed from the order of Judge BECK to the Supreme Court of Iowa, where the case (under the name of *Holman et al.* v. *Fulton*) has been heard by the full court, but not yet decided. Should the court reverse Judge BECK's order, the supervisors will be remanded to the custody of the marshal, who will of course take them before Judge DRUMMOND, as commanded in the writ. If, however, the court affirm Judge BECK's order, the case will go to the Supreme Court of the United States, whose decision will be final, and will, without doubt, be promptly obeyed by the Supreme Court of Iowa. Indeed it is proper to say in reference to that court, whose position has been somewhat misunderstood, that, while firmly maintaining its right to conclusively construe the laws and constitution of Iowa, it has from the beginning of the difference of opinion between it and the United States Courts, yielded a ready obedience to the judgments of the ultimate tribunal, even when unconvinced of their intrinsic soundness. Thus in *Thompson* v. *Lee County*, 22 Iowa 206, (1867), plaintiff recovered a judgment in the federal court upon railroad bonds, which would have been held void by the state courts had he sued originally in them. Upon the record of this judgment he sued in the state court, and recovered judgment, the Supreme Court of the state holding that the judgment of the Federal court was conclusive, and the county could not again raise the question of the constitutionality of the bonds.

The moderation and sincere desire to have every point settled in the due and regular course of law, manifested by the Iowa court in every apparent conflict like the present, is in praiseworthy contrast with the hasty and reckless action of the New York court, in the matter of Pratt referred to below.[1]

FEDERAL AND STATE AUTHORITY—CONFLICT OF JURISDICTION IN NEW YORK. One J. H. Pratt was arrested (August 6th 1869) by the United States Marshal for the southern district of New York, on a warrant issued by United States Commissioner Osborn, charging that said Pratt, on October 4th 1868, at Jefferson, in the state of Texas, did commit murder by forcing the safeguard of United States troops and killing certain persons named, and that he did then and there with others commit the crime of treason against the United States. Pratt was committed by the commissioner to the custody of the marshal, to be produced for examination on August 9th, at 2 P. M., and was by the marshal placed in custody of the keeper of the county jail. On August 7th, Judge MCCUNN, of the Superior Court of New York, issued a writ of *habeas corpus* to the keeper of the jail, commanding him to produce Pratt before him (MCCUNN) on August 9th, at 12 M. At that time the jailer, following the course laid down in *Ableman* v *Booth*, 21 How. 506, made return that Pratt was held under process of the commissioner, setting forth the warrant, but not producing Pratt

[1] Since writing the above, we learn that the Legislature of Iowa at its last session, passed "an act to enable public corporations to settle their indebtedness" (Laws 1868, ch. 67, p. 85,) under which the counties and towns indebted, are taking up their bonds and paying in new bonds, so that this long and unpleasant controversy will be speedily settled.

Judge McCUNN thereupon said that Pratt must be produced, and directed the jailer to have him in court at 2 P. M., on pain of attachment for contempt. This was the hour at which the marshal had been directed to have Pratt before the commissioner, and accordingly the marshal, at about half past one o'clock, took Pratt in charge and brought him before the commissioner. At 2 o'clock the jailer came in and requested the commissioner to allow Pratt to be taken before Judge McCUNN, which the commissioner refused. After consultation, however, and under the supposition that the production of Pratt would be sufficient, and that the judge would not assert further jurisdiction, the marshal took Pratt over to the court-room and allowed the jailer to produce him before Judge McCUNN. Judge McCUNN however proceeded to hear the case on the merits, and after argument by Pratt's counsel and the United States District Attorney, made an order remanding Pratt to the custody of the marshal pending his decision. The marshal, claiming to hold Pratt not under any such remand but under the commissioner's warrant, removed him to Fort Schuyler for greater security.

On the 11th Judge McCUNN delivered an opinion discharging Pratt, on the ground that the warrant was not a legal commitment, because, first, the charge of treason, if taken unconnected with the acts alleged, was too general to be valid, and if taken in connection with the acts charged, they did not amount to treason; and secondly, the charge of murder as set forth, was a crime not against the United States, but the state of Texas, and the commissioner in New York had no jurisdiction to arrest for such cause.

On the following day the marshal was served with an order signed by Judge McCUNN, entitled "In the matter of J. H. Pratt," commanding John H Tracy (the jailer) and Francis C. Barlow (the marshal) to discharge Pratt from custody. It will be observed that the marshal, though named in this order and served with a copy of it, *was not in any way a party to the proceedings*, or judicially before Judge McCUNN. He was not named in the *habeas corpus* nor served with process, nor was the jailer (against whom alone the writ issued) his agent or deputy. (See *Randolph* v. *Donaldson*, 9 Cranch 76.) The marshal, therefore, considering that Judge McCUNN had no jurisdiction to examine the merits of the case after being judicially informed that the prisoner was held under the warrant of a United States commissioner (*Ableman* v. *Booth*, 21 How. 506), and also that even if there was jurisdiction in Judge McCUNN to make such order, the marshal not being party to the proceedings could not be bound by it, refused to discharge Pratt, and to prevent a rescue and protect himself from arrest for contempt by Judge McCUNN, he called upon the United States military authorities for a guard, which was accordingly furnished. Some prominence was given to this part of the case by the fact that the President, being in New York, was consulted by the marshal, and ordered the commanding officer at Fort Schuyler to furnish whatever force should be necessary to protect the marshal in the discharge of his duty. Judge McCUNN thereupon prepared an order to the sheriff of New York to take Pratt by force out of the possession of the marshal and the commandant of Fort Schuyler, but this order was not issued, as on August 16th, Commissioner Osborn, on final hearing, discharged Pratt from custody, for

want of evidence to sustain the charges on which the warrant had issued. With this the whole matter terminated.

CONSTITUTIONAL LAW—RIGHT TO VOTE—TEST OATH. *Green* v. *Shumway et al.*, in the Court of Appeals of New York, was an action against the inspectors of election of the city of Syracuse for refusing to receive plaintiff's vote at the election, in April 1867, for delegates to the Constitutional Convention. The Act of Assembly of New York providing for the convention and the election of delegates to it, provided that no person should vote who would not, if duly challenged, take the following oath: "I do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not wilfully desert from the military or naval service of the United States, or leave this state to avoid the draft during the late rebellion."

The plaintiff was challenged and refused to take the oath, whereupon defendants rejected his vote. The court, per MILLER, J., held the law requiring such an oath invalid, being in violation of the constitutions both of the United States and of New York.

MUNICIPAL CORPORATION—CONTRACT TO SUPPLY PATENTED ARTICLE—NICHOLSON PAVEMENT. *Astor* v. *The Mayor, &c.*, in the Supreme Court of New York, was a bill for injunction against the paving of Thirty-third street, in the city of New York, with Nicholson pavement, on the ground that the law required that all work done for the corporation should be on contract made with the lowest bidder, after public notice, &c., and the pavement being patented could not be the subject of public competition, and the contract was therefore unlawful. The same point was decided in opposite ways in *Dean* v. *Charlton*, 7 Am. Law Register 564, and *Hobart* v. *Detroit*, Id. 741. The court, INGRAHAM, J., held that the article in the charter and the statutes of New York did not apply to such a case, and dissolved the injunction, citing the two cases already mentioned, and also *People* v. *Flagg*, 17 N. Y. 584, and *Harlem Gas Co.* v. *Mayor*, 33 N. Y. 309.

ECCLESIASTICAL TRIBUNAL—INTERFERENCE BY A COURT OF EQUITY. *Charles E. Cheney* v. *Samuel Chase et al.*, in the Superior Court of Chicago (August 1869,) was a bill for injunction. Complainant was a minister of the Episcopal church, and defendants were also ministers of that church claiming to sit as a court for the trial of plaintiff, on the charge of having, "on divers occasions within the last two years or within the last six months, omitted the words 'regenerate' or 'regeneration,' in the office of infant baptism." The bill set forth that the court was not constituted in accordance with the canons of the church; that the proper notice was not given complainant; that at least one member of the court had expressed beforehand an opinion of

complainant's guilt, and that his right of challenge was denied; and that the presentment did not specify time, place or circumstances of the offence alleged, or the names of witnesses to be called to prove the allegations. The case was fully argued by distinguished counsel on both sides, and the court, JAMESON, J., commenting with much severity on the proceedings of the ecclesiastical court, held all the objections in the bill to be good, and awarded an injunction. His judgment was delivered orally (in advance of a full opinion to be filed hereafter), and is reported in the Chicago Legal News for August 7th, from which we extract the following synopsis:—

1. If an ecclesiastical tribunal proceeds to try an offender who is a church member, according to the canons of the church, a civil court has no right to interfere; but if such ecclesiastical tribunal transgress such canons, and thereby injure the temporal rights of the accused, the civil courts will, upon proper application, interfere.

2. An ecclesiastical court in this country is nothing more than a voluntary association of individuals.

3. Under canon 20 of the Protestant Episcopal Church, in the Diocese of Illinois, the bishop can only institute proceedings for the trial of a person for offences, on information coming to him from one of three sources—from a majority of the vestry, from three presbyters of the church, or from public rumor, and it is not sufficient for him to say that he has been "credibly informed," &c.

4. Under the canons the bishop should select eight persons, out of whom the accused has the right to select five, and also to twenty days' notice from the bishop in which to make the selection.

5. The accused has the right of challenge.

6. When the members of an ecclesiastical tribunal have no right to proceed at all, it will be presumed that they intend all that may befall, even the worst consequences, under the canons of the church.

7. The presentment should state the offence clearly, giving time and place, and it is insufficient to state that the accused has omitted the word regeneration in the infant baptism service on divers occasions within the past two years, without specifying the time, or place, or circumstances, or names of the witnesses who were to be called against the accused.

8. The wrongful deposition of a minister of the gospel, who is receiving a salary, is such an injury to his temporal rights, as will call for interference by a court of equity.

It is understood that the case goes by appeal to the Supreme Court of Illinois.

INCOME TAX—MEANING OF THE WORD "PERSON"—SHAKER COMMUNITY. Commissioner Delano has decided that the word *person* in the Internal Revenue Acts, for the purpose of taxation on incomes, includes an association or community holding its property in common, like the Shaker Community at New Lebanon, Ohio. This is a community of forty-six covenanting male members, making return through one Boyd, of the entire income of the community, and claiming to deduct $1000 for each member. The commissioner holds that this is not correct; that the community is a *person* within the acts, and is entitled to only one deduction of $1000. This is in reversal of a previous decision of Commissioner Lewis, but is supported by a late decision of

the Supreme Court of Ohio, which held, in *Boyd* v. *Lackey et al.* (not yet reported), that the individual members of this community are not tax-payers within the statute requiring a petition for highway to be signed by a majority of resident freehold tax-payers. The letter of Commissioner Delano will be found in full in 10 Int. Rev. Record 39.

ADMIRALTY—COLLISION ON THE HIGH SEAS BETWEEN STEAMER AND SAILING VESSEL CARRYING FORBIDDEN LIGHT—APPLICATION OF STATUTORY RULES WHERE FOREIGN VESSEL IS CONCERNED. *Sears et al.* v. *Steamer Scotia*, in the District Court of the United States for the Southern District of New York (Feb. 1869), was a libel by the owners of the American ship Berkshire, against the British steamer Scotia, for loss by collision. It appeared that about two o'clock in the morning of April 11th 1867, in the Atlantic Ocean, the Berkshire was sailing, with the wind somewhat free, on a course, as set forth in the libel, S. E. by E. half E., and the Scotia was steering W. by N. half N. The Berkshire discovered a white light on her port bow four or five miles off, which seemed to come directly towards the Berkshire, whose helm was put to starboard. The Scotia had all her regulation lights set, and on discovering a white light on her port bow apparently about five miles off, ported her helm and kept on, taking the light to be a steamer. The light appeared to recede gradually from the Scotia's bow until very shortly before the collision, when it began to close in, and the Scotia at once reversed her engines, but too late to avoid the collision.

The Berkshire claimed that the Scotia was in fault as she had time to avoid the Berkshire, but put her helm to port knowing that the Berkshire had the wind free, and attempted to cross her bows. The Scotia claimed that the course of the Berkshire was more southerly than was alleged in the libel, and that she was in fault because she had only a white light carried low down on her anchor stock, thereby violating the laws both of England and America, and leading the Scotia to suppose it was a steamer too far off for her colored lights to be visible, and that the Scotia's action in porting her helm, under the circumstances, was in accordance with the laws of both England and America.

The new and important question involved was, whether the Scotia, being a British vessel, could set up as a defence the violation by the Berkshire of the statutes of the United States. The court, BLATCHFORD, J., held that it could not; that a foreign vessel cannot set up against an American vessel a statute which is not mutually binding, and which would not therefore be available in favor of the American vessel against the foreigner; citing *The Dumfries*, 1 Swa. 63; *The Zollverein*, Id. 96; *Cope* v. *Dougherty*, 4 K. and J. 367, 389, 390, S. C. on appeal, 2 De G. and J. 614; *The Saxonia*, 1 Lush. 410; *The Chancellor*, 4 Law Times N. S. 627; and *Williams* v. *Gutch*, 14 Moore P. C. C. 202.

The claim on the part of the Scotia that the statute of the United States should be enforced in her favor because the rules prescribed by the British and American statutes are the same, was held not to be tenable. The court said that the practice of the English courts to enforce the English rules against vessels of other nations was founded upon the Queen's orders in Council, under the authority of sect. 58 of the Merchant Shipping Amendment Act of July 29th 1862, which

provides that whenever it is made to appear to her Majesty that the government of any foreign country is willing that the regulations shall apply to the ships of such country when beyond the limits of British jurisdiction, her Majesty may by order in Council so direct, and the passage of the Act of Congress of April 29th 1864, prescribing rules for American vessels substantially identical with the British, was properly taken as an expression of willingness on the part of the American government that the British rules should be so applied. The Act of Congress, however, contains no such authority for courts of the United States to apply the rules prescribed by it either in favor or against foreign vessels.

"The merits of the collision in this case," said BLATCHFORD, J., "must therefore be adjudicated according to the rules of navigation and usages of the sea which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place: *The Fyenoord*, 1 Swabey 374, 377. I can have no hesitation in saying what such rules and usages were, when I find them to have been before that time adopted, with such identity, by nearly all the nations whose ships usually navigated the waters where this collision took place, embracing, among others, the United States, Great Britain, France, Spain, Prussia, Russia, Norway, Sweden, Belgium, Bremen, Denmark, Hamburg, Lubec, Hanover, Schleswig and the Netherlands. I rest my decision on that ground, and not on any municipal statute or statutes, as such, of the United States, or of Great Britain, or of both countries. I have not been referred to, nor have I met with, any case in the United States in which this question is discussed or decided. I must, therefore, resolve it on principle. But I have no hesitation in saying, that the result I have arrived at is very satisfactory, as bearing on the interests of commerce and the safety of human life, in substituting fixed written rules observed by all the maritime nations, for those which, it is no disparagement to say, were not as definite or certain, or as universally recognised."

On this ground therefore the court held that the Berkshire was in fault, both in carrying a white light and in not carrying colored lights. The answer, however, the court said must be amended so as to set up properly the fact that the Berkshire did not, as to lights, comply with the rules of navigation and the usages of the sea, customarily observed, at the time and place of the collision, by the vessels which navigated the waters where the collision took place. On the answer being so amended, the libel would be dismissed with costs.

ADMIRALTY—DAMAGES TO SEAMAN FOR NEGLECT WHILE SICK. *Tomlinson* v. *Hewett*, in the United States District Court for California, was a libel for damages against the master of a vessel. Libellant was a seaman, and while on board ship was taken with small pox. The captain on assurances that he had made arrangements for his care, induced the seaman to go in a small boat to a town some fifteen miles up the river. On arriving there he found not only no such arrangements made, but no physician living there, and he had only $17 given him by the captain. He accordingly returned, but was not allowed to come aboard the vessel, and finally went in the small boat six miles down the

river, and then rode on horseback twenty miles to another town, where he arrived so exhausted that he fell from his horse and lay on the beach for thirty-six hours before he received aid. The town to which he went was distant twenty-six miles by water from the place where libellant was put out of the vessel, and was in the direct line of the voyage; but the captain refused to take him there on board the vessel. HOFFMAN, J, in giving judgment, said that the fact of the disease being malignant and infectious was good reason why the master should put the seaman ashore at the earliest moment consistent with his receiving proper care; but was no justification of the course pursued, especially as the captain knew that at a port, only twenty-six miles distant, and to which the vessel was to sail the next day, proper medical attention and care could be secured. Judgment was therefore entered for libellant for $2500.

CONSTITUTION OF NEW YORK—THE JUDICIARY. The new constitution, framed by the convention last year, will be submitted to the direct vote of the people for adoption or rejection in November. The Judiciary article, which is submitted to a separate vote, provides for the establishment of a Court of Appeals, to consist of seven judges, holding their office for fourteen years. The other courts remain very much as they now are, except that the terms of the judges are lengthened to fourteen years. This is a great improvement on the present wretched system, under which the highest court in the state is liable to change one-half its members yearly. The most notable feature, however, in the new constitution is a provision that in 1873 the question shall be submitted to a vote of the people whether the judges shall not thereafter be appointed by the governor. The results of making the judiciary elective, have, it thus seems, become so apparent, that the state which first made the fatal blunder is beginning to look to its correction. We regret that the convention, certainly one of the ablest and most laborious that ever sat in that state, proceeded so timidly, and did not at once, and without hesitation, declare for a return to the system of appointment to judicial office for good behavior—the only system by which the bench can permanently retain its independence or its respectability. J. T. M.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

SUPREME COURT OF VERMONT.[3]

ATTORNEY. See *Debtor and Creditor.*

[1] From Hon. O. L. Barbour, Reporter; to appear in vol. 53 of his Reports.

[2] From P. Frazer Smith, Esq., Reporter; to appear in 58 Pa. Rep.

[3] From W. G. Veazey, Esq., Reporter; to appear in 41 Vt. Rep.